INDEX

	PAGE
Statement of the Case	1
With Respect to Reasons Relied on By Petitioner for the Allowance of the Writ:—	
1. With respect to Petitioners Reason No. 1 that the decision below conflicts with applicable state law as to renewal of a lease by conduct constituting waiver of notice	14
2. With respect to Petitioners Reason No. 2 that the decision below raises significant and important questions concerning real estate leases	17
Conclusion	18
Certificate of Service	19

CITATIONS

CASES	PAGE
McIntyre vs. Coker, 274 Ala. 457, 157 So.2d 220	14, 15, 16
Liverpool & London & Globe Ins. Co. vs. Dickenson, 242 Ala. 107, 5 So.2d 90	15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 503

THE HUDSON OIL CO. OF MO., INC., a corporation,
Petitioner,

v.

W. W. McLEOD; MAE J. McLEOD; R. K. YEAGER; ALINE H. JACKSON YEAGER; CLIFFORD H. JACKSON, JR.; SUE K. JACKSON; LILLIAN JACKSON WILLARD, individually and as co-executor and co-trustee of the will of E. E. WILLARD, Deceased; FIRST NATIONAL BANK OF MOBILE, as co-executor and co-trustee of the will of E. E. WILLARD, Deceased; and JOHNSON REAL ESTATE, INC., a corporation,
Respondents.

BRIEF OF RESPONDENT JOHNSON REAL ESTATE, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In October 1955 Mr. E. E. Willard, Mr. Clifford H. Jackson and Mr. and Mrs. W. W. McLeod were the owners (though Mr. and Mrs. McLeod were the record owners) of two parcels of land fronting on New U.S. Highway 90 (the newly constructed highway) in the City and County of Mobile, Alabama. One parcel, hereinafter called the Large Parcel, had a frontage of 735 feet and the other parcel was a triangular parcel fronting 220 feet on the highway, the two parcels being separated by a third parcel with a frontage of approximately 50 feet, owned by one Prince. (A. 87, 113, 200, 246, 247, 248 & 255)

It is the triangular parcel which is involved in this lawsuit.

Mr. Willard handled all of the business and business transactions relating to these two parcels of land until his death on October 31, 1962. (A. 260, 264)

Mr. Willard negotiated a lease on the triangular parcel with one Matthew Suraci (hereinafter called Suraci) for use as a gasoline service station. The lease was dated in October 1955 and was signed by Mr. and Mrs. McLeod, as Lessors, and by Mr. Suraci as Lessee, though neither Mr. or Mrs. McLeod had any personal contact or coversations with Mr. Suraci in connection with the negotiations, execution or delivery of the lease, or otherwise, though monthly rentals were paid to them. (A. 260, 264)

The lease (A. 12-23) was for a primary term of five years beginning November 1, 1955 and ending October 31, 1960.

The lease provided that the Lessee should have the right, at his option, to renew the lease for an additional five years after the expiration of the primary term "by giving Lessor written notice of his election to exercise such option of renewal at least six months prior to the expiration of the primary term hereof."

The lease also provided for two additional options to the Lessee to further renew the lease for two additional periods of five years each by giving Lessor similar written notice.

The lease provided that the Lessee should have the right, at the end of the primary term or at the end of any renewal term if the lease were renewed, to remove all of his personal property, including any equipment or fixtures such as gasoline or oil pumps or tanks or other like articles notwithstanding the same might be attached to the realty, but that all buildings of any kind or other like improvements would be the sole property of the Lessor provided however that should Lessor desire, he might require Lessee to remove all such improvements and leave the premises in a level condition free of trash.

The lease also contained the following provision:

"The Lessor further agrees that should he

> desire and undertake to sell the leased premises or any portion thereof, he will first give the Lessee the right and privilege of refusing to purchase same at the same price as that contained in any bona fide offer that the Lessor is willing to accept."

Subsequently Mr. Jackson died testate leaving all of his property to his widow, Aline H. Jackson, (now Yeager) and his son, Clifford H. Jackson, Jr. (A. 56)

On September 11, 1957 Mr. and Mrs. McLeod executed a deed, which was duly then recorded, by which title to the properties hereinabove referred to was shown to be in E. E. Willard and the abovementioned devisees of C. H. Jackson, deceased, along with the McLeods. (A. 56-62)

Suraci operated a gasoline service station on this property until on April 1, 1958 he executed an instrument of assignment to Hudson Oil Co. of Mo., Inc. by which he assigned the lease for the primary term hereinabove referred to, "together with renewal options, with all and singular the premises therein mentioned and described and the buildings thereon together with the appurtenances thereon." In delineating those things which were assigned, no mention was made of the right of first refusal and no reference to this right of first refusal was made anywhere in the assignment instrument. (A. 272)

Following the signature of Suraci to this assignment is the following, which was signed by C. H. Jackson, Jr., Sue F. Jackson, Aline H. Yeager, R. K. Yeager, E. E. Willard, Lillian Willard, Mae J. McLeod and W. W. McLeod:

> "The undersigned Lessors hereby consent to the above assignment waiving none of their rights under said lease as to Lessees or assigns."

Hudson Oil Co. of Mo., Inc. hereinafter called Hudson, Appellant-Petitioner in this cause, thereafter operated the gasoline service station on this property.

In the early part of June 1960 Mr. Willard came to the store operated by Mr. and Mrs. McLeod and inquired of them as to whether either of them had received any notice from Hudson or Suraci that they intended to extend the lease past the expiration date of October 31, 1960. At this time Mr. and Mrs. McLeod knew that the lease required six months written notice of election to exercise the option to renew the lease and that, if the Lessee desired to renew, such notice had to have been given before May 1, 1960. No such notice had been received by Mr. and Mrs. McLeod and they so advised Mr. Willard.

Thereafter and on June 10, 1960, (this being the date of the acknowledgment before the Notary Public) Mr. Willard and wife, Mr. and Mrs. McLeod,

Clifford H. Jackson, Jr. and wife, and Aline H. Yeager (nee Jackson) and husband signed and delivered an option agreement which Mr. Willard had negotiated, with Motor Investment Corporation granting it an option to buy the aforesaid large parcel for $262,500.00, which option agreement also provided that, in substance, Motor Investment Corporation was to have an option to buy the triangular parcel for $40,000.00 payable $10,000.00 down and the balance, evidenced by note for $30,000.00 and secured by Vendor's Lien Deed, payable in 300 equal monthly payments, which option could be exercised by notice in writing at any time within one year following the date of closing of the sale resulting from the exercise of the option to purchase the large parcel, the effect of which was to make this option to purchase the triangular parcel contingent and dependent upon exercise of the option to purchase the large parcel and the closing of the sale and taking title thereto. The McLeods knew, at the time they signed this agreement that the lease had not been renewed or extended beyond October 31, 1960. (A. 205-215, 258, 259 and 262)

Subsequently and on June 27, 1960, Mr. Hayden Rector, Attorney for Hudson, telephoned the McLeods and asked them if they had received any notice from Hudson notifying them that Hudson intended to extend the Suraci lease for an additional period after October 31, 1960. The McLeods told Mr. Rector that they had not received any such notice. (A. 262, 263, 91)

A few days thereafter the McLeods received a

registered letter dated June 27, 1960 from Hudson and addressed to them, enclosing a photocopy of an unsigned copy of a letter purporting to be dated April 25, 1960 by Hudson addressed to Mr. and Mrs. McLeod and purporting to give six months written notice to exercise option to renew the lease for an additional five years commencing November 1, 1960 and purporting to request the McLeods to acknowledge receipt thereof. (A. 259, 263, 89, 90)

Mr. and Mrs. McLeod never received any letter from Hudson dated April 25, 1960 (except that a copy was enclosed in the registered letter of June 27, 1960 which they did receive, as aforesaid) and never received any letter or notice from either Hudson or Suraci relating to the exercise of option to renew the lease for a period beyond October 31, 1960 (except said registered letter of June 27, 1960 with its aforesaid enclosure). There is no averment, affidavit, statement or any other evidence, in this case that a letter, alleged copy of which, dated April 25, 1960, was enclosed in said registered letter dated June 27, 1960, was in fact written and or signed by Hudson or was in fact mailed to the McLeods on April 25, 1960, or any other date (other than by enclosing a copy thereof in the registered letter of June 27, 1960). The registered letter of June 27, 1960 itself does not say that the alleged letter of April 25, 1960, copy of which was enclosed therewith, had been mailed. (A. 259, 260, 263)

When the registered letter dated June 27, 1960,

enclosing copy of an alleged letter dated April 25, 1960, was received by the McLeods, they took it to Mr. Willard or notified him that it had been received and he stated to them that the letter had been received too late and that the deal with Motor Investment Corporation had already been signed and that the Hudson Oil Co. lease would expire in October 1960. (A. 260)

Motor Investment Corporation exercised its option to purchase the large parcel and after some delay, occasioned by the necessity for having the property rezoned and the filing and processing of a lawsuit to clear restrictions thereon, closed the trade for this large parcel and acquired a deed thereto on December 4, 1961, which deed provided for an option to purchase the triangular parcel, exercisable within one year. This deed was then recorded. (A. 249)

The purpose of Motor Investment Corporation in acquiring the option to purchase said large parcel and acquiring title thereto was for use thereof for the construction of facilities for and operation therefrom of the automobile sales and service business of Johnson Chevrolet, Inc., a related corporation. In 1962, soil tests indicated the advisability of changing the type of building and location thereof on the property, as originally planned, and the consequent advisability of acquiring and using in connection therewith the Prince property and said triangular parcel, the latter to be a part of the used car lot. Arrangements were made to purchase the Prince property and Motor Investment Corporation exercised its op-

tion to purchase said triangular parcel. Thereafter the title to the Prince property was acquired and subsequently Motor Investment Corporation assigned its option on the triangular parcel to Johnson Real Estate, Inc., another related corporation, (hereinafter called Johnson) which took title by Vendor's Lien Deed dated June 15, 1964, the interest of Mr. Willard, deceased, being thereby conveyed by his widow individually and by her and The First National Bank of Mobile as Executors and Trustees under the last will of Mr. Willard. Mr. Fred Dassori, who handled this matter on behalf of Motor Investment Corporation and Johnson, understood at this time and prior thereto that the Suraci-Hudson lease had not been renewed and did not know of any contention, if any, on the part of Hudson that the lease had been renewed. (A. 250, 253, 248, 249)

Such changed plans were followed in the construction of the building, the building and plant costing, exclusive of land costs, in excess of $500,000.00. (A. 254)

Promptly after the execution of said deed dated June 15, 1964, the Grantors in that deed notified Hudson of such conveyance and that rents should thereafter be paid to Johnson and Johnson also promptly notified Hudson of this purchase and advised it that it might remain in possession of the premises until further notice as a month to month tenant. Hudson thereafter forwarded to Johnson its check dated July 1, 1964 covering rent for the month

of July 1964, but thereafter stopped payment thereon and so notified Johnson by letter advising that it was in possession of the property under the aforesaid lease and requesting full information as to the terms and conditions of the purchase so it could consider whether or not it wished to exercise the right of first refusal contained in said lease. (A. 93, 221, 222, 251, 252, 174)

Thereafter, Johnson, through Mr. Dassori, had conferences and correspondence with Hudson and its Attorney, Mr. Rector, with respect to Hudson's alleged rights until the complaint in this case was filed. (A. 88, 93, 200)

Meantime no rent was tendered or paid to Johnson, though Hudson tendered monthly rent checks to the McLeods who did not accept but returned the same with the statement that it was not they but Johnson who was entitled to such rents, and this continued to and after the time the complaint was filed until at some point in the course of this litigation, Hudson started paying such rent to the Clerk of the Court who of course retains the same. (A. 88, 93, 200)

Neither Hudson nor Mr. Rector, prior to filing of this suit, unequivocally notified Johnson that it desired to purchase the property for the same price paid therefor by Johnson, though by letter dated August 20, 1964, Mr. Rector did state that Hudson wished to exercise its option to purchase the prop-

erty on the terms outlined in the Vendor's Lien Deed to Johnson and was prepared to reimburse Johnson for the amount so far paid towards the purchase price and to receive an assignment of the Vendor's Lien from Johnson in favor of Hudson, and Johnson also received copy of a letter by Mr. Rector dated September 27, 1965 addressed to the McLeods, in which Mr. Rector stated that Hudson desired to exercise its privilege to purchase the property for the same price and under the same terms and conditions as those contained in the warranty deed with Vendor's Lien to Johnson. No purchase money was ever tendered and none brought into Court. (A. 191, 174)

On or about December 17, 1965 Hudson filed suit in the United States District Court at Mobile, Alabama (jurisdiction being based upon diversity of citizenship of the parties) averring the execution and contents of the lease, the instrument of assignment and the Vendor's Lien Deed to Johnson, respectively, averring that it, Hudson, "gave timely notice of renewal" of said lease for another five year term commencing November 1, 1960 and that the Grantors in said deed to Johnson had failed to extend to Johnson the rights granted under the "option to purchase" in the lease and that it had given notice to all defendants of its desire to exercise such option and defendants had failed to convey the property to it and refused to recognize its right under said lease, averring that it was and had been in possession of the property since said assignment, paying rentals therefor to the McLeods, had made "extensive and costly improve-

ments thereon" and that on the execution of said deed, Johnson had advised it that it owned the property and that it might remain in possession of the premises until further notice as a month to month tenant and that it had continued to tender rentals to the McLeods. The complaint prayed for declaratory relief that Hudson was entitled to all rights of the lessee by reason of said assignment, that it was entitled to purchase the property involved for the same price and under the same conditions as those contained in the conveyance to Johnson and that the deed to Johnson is null and void, and prayed, as supplementary relief, that the Court would specifically enforce the option contract of purchase and decree that Plaintiff was entitled to a deed to the property involved on payment of the purchase money and performance of such conditions as the Court should decree and enter an order cancelling and annulling the said deed to Johnson and further praying damages and Attorney's fees and, in the alternative that if the Court failed to grant relief as prayed for "the Court would order defendant to pay Plaintiff damages for the value of the improvements made by Plaintiff on the premises."

The answers of Johnson and the other Defendants, among other things, denied that Plaintiff had any right to purchase the property under the terms of said lease, denied that the assignment had transferred any right to purchase to Plaintiff, denied that Plaintiff had given timely notice of renewal of said lease for another five year term commencing November 1, 1960 and averred that they were without

information or knowledge as to any improvements made on the premises by Plaintiff, Johnson further averring in its answer that it was entitled to all rentals from the date of the deed to it and praying that the Court, in granting declaratory relief, would deny the relief prayed for by Plaintiff and would declare that Plaintiff acquired no rights to purchase said property by virtue of said assignment and had no right to specific performance and that Plaintiff had failed to give notice of this election to exercise the option to renew said lease for a term of five years after the expiration of the primary term thereof at least six months prior to the expiration of said primary term and that said lease was not renewed and expired on October 31, 1960 and that since Johnson's purchase of the property in 1964 Plaintiff had been a tenant of Johnson on a month to month basis and is liable to Johnson for rental thereof or for use and occupation thereof and that the Court would ascertain the amount of such rental or indebtedness and interest and would order Plaintiff to forthwith pay the same to Johnson.

Hudson filed motion for summary judgment.

Neither Johnson nor any of the Grantors in the deed to Johnson (all being Respondents in this cause) had any knowledge of any improvements made on the premises by [redacted] Hudson. They did, of course, know that a gasoline service station was being operated from the premises and that someone had put in gas pumps and a station office. Affidavit of Hudson contained the bald conclusion that Hudson . . . "made

extensive and costly improvements which were made from the onset of its occupancy until June of 1964." Other than this there is nothing in the record with respect thereto and no indication anywhere as to the nature of such "improvements," whether gasoline pumps or tanks or what, nor with respect to the cost thereof nor when and how made or installed. (A. 88, 114, 200, 176, 189)

As hereinabove stated, there is no evidence of any kind that any notice of exercise of option to renew the lease for a period beyond the expiration of the primary term on October 31, 1960 was written or signed or delivered or mailed to the McLeods or any other owner of the property at least six months prior to the expiration of said primary term as provided for in the lease, and no evidence that Hudson "gave timely notice of renewal" of said lease for another five year term commencing November 1, 1960, as averred in the complaint except the bald conclusion in Hudson's affidavit that "Hudson gave timely notice of a renewal of the lease for a second five year term commencing November 1, 1960 and as required by the terms of the lease." There is no evidence that Hudson, prior to the conveyance of the property to Johnson, took the position that the lease was renewed nor that it had advised or made known to Mr. Willard or anyone else that it considered or took the position that the lease was renewed. Mr. Willard was dead at the time the complaint was filed and of course did not testify and Hudson offered no evidence as to whether or not Mr. Willard had made known to Hudson his position and that of the

other owners that the lease was not renewed nor as to whether or not Mr. Willard had any conversation or correspondence with Hudson or its representatives with respect to the occupancy of the property by Hudson subsequent to November 1, 1960 or the status of Hudson thereafter with respect to the property involved.

In fact, at the hearing on motion for summary judgment and in Hudson's memorandum brief in support thereof referred to and filed at this hearing, Hudson in effect abandoned the theory that the lease had been renewed by virtue of a timely notice of election to renew given as required by the lease, and sought to rely upon the principles of implied waiver, citing the case of **McIntyre** vs. **Coker**, 274 Ala. 457, 150 So. 2d 220. (A. 226) The Trial Court found that the lease had not been renewed beyond its primary term and that thereafter Hudson was a tenant at will or tenant on a month to month basis. The Circuit Court of Appeals held that the record in this case does not justify a finding of waiver of notice within the Alabama rule of McIntyre vs. Coker and that "waiver cannot be implied **from the facts here**, including acceptance of increased rent," (underscoring ours) and that the lease expired on October 31, 1960.

WITH RESPECT TO THE REASONS RELIED ON BY PETITIONER FOR THE ALLOWANCE OF THE WRIT:

1. With respect to Petitioner's reason No. 1 that

the decision below conflicts with applicable state law as to renewal of a lease by conduct constituting waiver of notice:

The case of **McIntyre vs. Coker,** 274 Ala. 457, 150 So. 2d 220, cited by Appellant-Petitioner as the law of Alabama with which the decision of the Court below is alleged to conflict, held that where a lease provided that the Lessee had the privilege of renewing the lease by giving Lessor written notice of intention to renew at least thirty days prior to the expiration of the primary term, "the requirement of written notice may be waived by the parties and a waiver **may be** implied when the Lessee remains in possession and pays rent to the Lessor," (underscoring ours) and held that under the circumstances and facts involved in that case, the lease involved was effectively renewed.

The Supreme Court of Alabama in the case of **Liverpool and London and Globe Insurance Company vs. Dickenson,** 242 Ala. 107, 5 So. 2d 90 said:

> "The question of waiver, through voluntary surrender of a known right, is in the main a question of intention, and the authorities hold that, to be effectual, it must be manifested in some unequivocal manner; if not express, then by such language or conduct as to evince clearly the intention to surrender (citing cases)."

The Circuit Court of Appeals in the case at hand did not hold, as Petitioner in its petition says it did, that a waiver **cannot** be implied from acceptance of increased rent, period. (underscoring ours). It simply held that the record does not justify a finding of waiver within the Alabama rule of **McIntyre vs. Coker** and that a waiver cannot be implied from the facts here, including acceptance of increased rent. In short, the Circuit Court of Appeals simply found that under all the facts in this case that was no waiver of the requirement of written notice.

Not only is this not in conflict with Alabama State Law but on the contrary is in recognition of and consistent with Alabama State Law and, while the laws of other states are not here involved, this is not in conflict with the laws of any other state, so far as we can find, and certainly not in conflict with the decisions from other jurisdictions cited by Petitioner.

Petitioner refers to a second question allegedly presented, concerning whether the right of first refusal passed to Petitioner by the instrument of assignment to it. The District Court found that the lease had not been renewed and while it unnecessarily also found that the right of first refusal did not so pass to Petitioner, the Circuit Court of Appeals very properly held that in view of its finding that the lease was not renewed, it was not necessary for it to decide the question as to whether the instrument of assignment also conveyed the right of first refusal.

Since the Court of Appeals made no decision on this question, it can hardly be said that its decision on this question conflicts with applicable state law and it appears to us that there is in this aspect of the matter no element of a reason to be relied upon for the allowance of the Writ.

2. With respect to Petitioner's reason No. 2 that the decision below raises significant and important questions concerning real estate leases:

It is submitted that the decision of the Circuit Court of Appeals does not raise any such questions and that Petitioner has not shown wherein it does. The law of Alabama in this regard is the same now as it was before the decision of the Circuit Court of Appeals in this case and nothing in the decision of the Circuit Court of Appeals purports to change it nor deviate from it.

CONCLUSION

No reason has been advanced by Petitioner for the allowance of the Writ and we submit that no reason for the allowance of the Writ exists in this case and that the application for the Writ should be denied.

Respectfully submitted,

Frederic D. Dassori
3000 Connecticut Avenue
Washington, D.C. 20008
Counsel for Respondent Johnson Real Estate, Inc.

Alvin McConnell
Kearley & McConnell
Van Antwerp Building
Mobile, Alabama 36602
Counsel for Respondent Johnson Real Estate, Inc.

MEMO: References in Statement of the Case are to the Appendix as filed in the Circuit Court of Appeals in this matter.

CERTIFICATE OF SERVICE

I, Frederic D. Dassori, Counsel for Respondent Johnson Real Estate, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that I served three copies of the within brief on each other party separately represented in this proceeding by mailing three copies of this brief to Mr. Michael J. Salmon, counsel for Petitioner, addressed to him at his post office address, 324 International Trade Center, Mobile, Alabama 36602, first class air mail prepaid postage and by mailing three copies of this brief to Mr. Jere Austill, Jr., counsel for the Respondents in this cause other than Johnson Real Estate, Inc., first class air mail prepaid postage, addressed to him at his post office address, 1005 Van Antwerp Building, all on this ——— day of ———————, 1970.

FREDERIC D. DASSORI

CERTIORARI DENIED N.C.R.